



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 64 OF 2012

SAMUEL MACHARIA IHWAGI

JOHN KAGWE IHWAGI

**(SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE
NELSON IHWAGI MACHARIA DECEASED).....PLAINTIFF**

VERSUS

NAFTALI KWARI MUTHULI.....DEFENDANT

RULING

Before the court for consideration are two applications. The first one is the chamber summons dated 27th day of June 2016 by the Defendant under **Order 2 Rule 15** of the **Civil Procedure Rules 2010** and **Section 3A** of the **Civil Procedure Act**. The other is the Notice of Motion dated 18th October 2016 by the Plaintiff and brought **under Order 8 Rule 3(2)** of the **Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act, Sections 27 and 28 of the Limitation of Actions Act and Article 150 of the Constitution of Kenya**. The application dated 27th June 2016 seeks orders that; the entire suit herein be dismissed as it is barred by limitation and the costs of the application and of the suit be provided for. On the other hand, the application dated 18th October, 2016 seeks orders that; the court admit the Plaint and suit therein out of time and that the plaint be deemed as properly filed and within the stipulated time.

This court will consider both applications together.

The application dated 27th June 2016 is premised on the grounds particularized on its face and its supported by the affidavit of Paul Kariba sworn on the 27th day of June 2016. The epitome of the application is a plaint which is alleged to have been filed out of time. In his supporting Affidavit, the Applicant avers that the Respondent filed a plaint and Verifying affidavit on the 17th of February 2012 to which the Applicant/Defendant responded by entering appearance on 13th June 2013 and filing a defence on 27th June 2013. The Respondent/Plaintiff then filed an application to have the plaint admitted out of time which was challenged by the Applicant through Grounds of Opposition dated 2nd February 2013. The Applicant elected to withdraw the Application and the same was allowed with costs to the defendant. He argues that the Plaint remains statute barred and should be struck out.

In the Replying Affidavit dated 21st October 2016, the Respondent maintains that the delay was not intentional as it was occasioned by the insurance company of motor vehicle KAS 531B who had shown willingness to settle the matter. They further averred that they filed the application dated the 18th of

October 2016 seeking to have the time within which to file the suit extended and the suit be deemed to have been properly filed out of time. The Respondents pray that the application dated 27th June 2016 be dismissed with costs as it is not merited and the application dated 18th October 2016 be allowed.

The Notice of Motion dated 18th October 2016 is based upon the grounds set out therein and on the supporting affidavit sworn by Samuel Macharia Ihwagi and dated 18th October 2016. The Plaintiff/Applicant avers that the delay was not their fault. They submitted that the failure to file the Plaint before the lapse of the limitation period was occasioned by their inability to obtain Letters of Administration on time for the purposes of filing and prosecuting the suit. Further, they posit that the delay was occasioned by the inadvertence on the part of the plaintiffs advocate and it was not inordinate. It is the Plaintiffs/Applicant contention that no prejudice will be suffered by the defendant/Respondent should the application be allowed.

In response, the Defendant/Respondent filed a replying affidavit sworn by Paul Kariba dated 22nd November 2016. They reiterated their grounds for opposition in the supporting affidavit of Paul Kariba sworn on the 27th day of June 2016. They contend that this current application by the Plaintiff is similar in both form and content to the one that they had withdrawn earlier and that it is not one for leave to file the suit out of the time as there is no prayer in the application to have the suit filed out of time hence it amounts to an abuse of the courts process and a waste of the court's time.

The Defendant has argued that the Plaintiffs obtained the Grant ad Litem on 2nd August 2010. Therefore, their explanation that the delay in filing the suit in 2012 was occasioned by their inability to obtain the Grant on time, is untenable. In addition, the Defendant avers that Section 27 of the Limitation of Actions Act does not include acts of inadvertence on the part of the advocate as a ground to allow extension of time. It is the Defendants assertion that the application dated 18th October 2016 is an afterthought aimed at delaying and denying justice to the defendant as the Plaintiff had not taken any steps to obtain leave to file the suit out of time in the duration since they filed the suit in 2012 knowing they were out of time.

The court has carefully considered the two applications and the submissions filed by the learned counsels for both parties in support of their respective applications. The statute of limitation has the effect of barring certain causes of action from being brought after the expiry of a particular period of time. This barring, however, does not necessarily extinguish such causes of action. In **Rawal vs. Rawal (1990) KLR** Bosire J (as he then was) stated:

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defense from being disturbed after a long lapse of time. It is not to extinguish claims”. See also **Dhanesvar V Mehta vs. Manilal M Shah(1965) EA 321.**

The import of this is that a cause of action that is barred may in certain cases be revived if the conditions set out in **Section 27** of the **Limitation of Actions Act**, Cap 22 Laws of Kenya are fulfilled. This section provides:

1. **Section 4(2) does not afford a defence to an action founded on tort where-**
 - a. **The action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and**
 - b. **The damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and**
 - c. **The court has, whether before or after the commencement of the action, granted leave for the purpose of this section; and**

2. The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which-

(a) either was after the three year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period ; and

(b) In either case, was a date not earlier than one year before the date on which the action was brought.

(3) This section does not exclude or otherwise affect-

(a) Any defence which, in an action to which this section applies, may be available by any written law other than section 4(2) (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) the operation of any law which, apart from this section would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

The above cited provisions clearly stipulate the circumstances under which the court may extend time for bringing an action barred by limitations statute. **Mbito, J** dealt extensively with the issue in **Lucia Wambui Ngugi vs. Kenya Railways & another Nairobi HCCA No. 213 of 1989** in which the learned Judge expressed himself as follows:

“When an application is made for leave under the Limitation of Actions Act, a judge in chambers should not grant leave as of course. He should carefully scrutinize the case to see whether it is a proper one to grant leave. Since it has been decided that the defendants have no right to go back to the High Court to challenge such orders, it is particularly important that when such an application is made, the order should not follow as a matter of course. The evidence in support of the application ought to be very carefully scrutinized, and, if that evidence does not make quite clear that the plaintiff comes within the terms of the Limitations of actions Act, then either the order ought to be refused or the plaintiff ought perhaps to be given the opportunity of supplementing his evidence. It must, of course be assumed for the purposes of the *ex parte* application that the affidavit evidence is true; but it is only if that evidence makes it absolutely plain that the plaintiffs are entitled to leave that the application should be granted and the order made, for, such an order may have the effect of depriving the defendant of a very valuable statutory right. It is not in every case in which leave has been given *ex parte* on inadequate evidence that the defendant will be able to mitigate the injustice which may have been done to him by obtaining an order for the trial of a preliminary issue... Section 27 of the limitation of Actions Act ... provides that limitation period under section 4(2) of the said Act can be extended in certain circumstances and by the provision of section 31 of the said Act, all limitation periods prescribed by any other written law is extendable by the provisions of section 27 of the said Act. Consequently this application can only succeed if the applicant can avail herself of the provisions of section 27 of the Act as read with section 31 thereof, which enact that the limiting provision shall not afford a defence to an action founded on tort where the court gives leave on account of the appellants ignorance of material facts relating to the cause of action which were of decisive character... Although what amounts to “ignorance of material facts of decisive character” is not always easy to distinguish, by section 30(1) of the Limitations of Actions Act when read with subsections (2) thereof, material facts of decisive character are said to be those relating to a cause of action which would enable a reasonable person to conclude that he had a reasonable chance of succeeding and getting damages of such amount as would justify the bringing of the action”.

Extension of time applies only to claims made in tort and even then the claims must be in respect of personal injuries arising from negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law). This was confirmed in **Mary Osundwa vs. Nzoia Sugar Company Limited Civil Appeal No. 244 of 2000** where the Court of Appeal held:

“section 27(1) of the Limitations of Actions Act clearly lays down that in order to extend time for filling a suit the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort”.

Upon a detailed scrutiny of the affidavits and the submissions by both parties, it is my view that Plaintiff’s application does not meet the threshold of the requirements set out in Section 27 of the Limitation of Actions Act. The Plaintiff has failed to demonstrate that their Application has met the requirements provided for in Section 27 of the Limitation of Actions Act.

The upshot of this is that I hereby issue the following Orders:

- a. That the Plaintiff’s Application dated 18th October 2016 is dismissed
- b. That the Defendant’s Application dated 27th June 2016 is allowed.
- c. No orders are made on costs of both Applications.

Dated, signed and delivered at Nairobi this 29th day of June 2017

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L. NJUGUNA

JUDGE

In the presence of:

.....**for the Applicant**

.....**for the Respondent**